

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1978

NO. 78-830

JOHN HITSON, SAMUEL MOORE,  
and WILLIAM MILLS,

Petitioners,

VS.

MADAM AGNES BAGGETT, in her  
official capacity as SECRETARY  
OF STATE OF THE STATE OF ALABAMA;  
HONORABLE GEORGE C. WALLACE, in  
his official capacity as GOVERNOR  
OF ALABAMA; HONORABLE WILLIAM BAXLEY  
in his official capacity as ATTORNEY  
GENERAL OF THE STATE OF ALABAMA,

Respondents.

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**BRIEF AND ARGUMENT IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

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WILLIAM J. BAXLEY  
ATTORNEY GENERAL OF ALABAMA

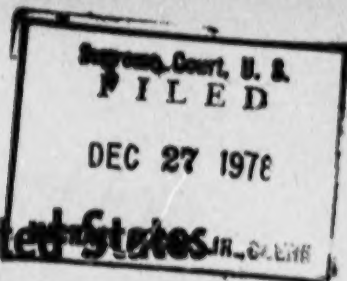
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**OPINIONS OF COURTS BELOW**

The Court Order of the Court of Appeals for the Fifth Circuit and the memorandum decision of the District Court are set out in Appendix A and Appendix B, respectively.

**JURISDICTION**

This is a civil rights action brought under 42 U.S.C. §1983. Jurisdiction is founded on 28 U.S.C. §1343.



## QUESTIONS PRESENTED FOR REVIEW

### I

Whether the present manner and system of selecting presidential electors results in invidious discrimination among the voters of the several states.

### II

Whether Alabama's electoral scheme for the selection of presidential electors discriminates against minority voters because it is not structured on a district basis.

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are Article II, Section 1, clause 2, Constitution of the United States, Article IV, Section 4, Constitution of the United States and the Twelfth Amendment to the Constitution which are set out in Appendix C.

## STATUTORY PROVISIONS INVOLVED

The statutes involved are Code of Alabama 1975, §17-19-3 and § 17-8-3 which are set out in Appendix D.

## STATEMENT OF THE CASE

Petitioners filed a complaint in the United States District Court for the Mobile District of Alabama in January, 1978. The complaint alleged, *inter alia* that the Alabama system for the selection of presidential electors discriminated against minorities because the Alabama scheme for selecting presidential electors was not on a district basis. (R.1-16)

On January 30, 1978, respondents filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted and on March 8, 1978, the District Court granted the motion to dismiss. (R. pp. 21-28)

Petitioners appealed the District Court's order and on September 6, 1978 the United States Court of Appeals for the Fifth Circuit affirmed without opinion.

Petitioners are registered voters in Alabama and their exercise of the right to vote in a presidential election is regulated by Article II, Section 1, of the United States Constitution and *Code of Alabama 1975*, §17-19-3 and §17-8-3. The Alabama statutory scheme for selecting electors was in effect prior to the presidential election of 1976. (R. 14) Petitioners sought to change this scheme prior to the 1980 presidential election. (R. 2)

## REASONS FOR DENYING THE WRIT

The method for electing a president and vice president is provided for in Article II, Section 1 of the Constitution of the United States and in the Twelfth Amendment to the Constitution. Article II, Section 1, Const. provides in pertinent part:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: . . .

The Electors shall meet in their respective states, vote by ballot for President . . . and transmit [the

tally of their votes] sealed to the seat of the government of the United States, directed to the President of the Senate; . . . The person having the greatest number of votes . . . shall be president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers . . . , the house of representatives shall choose . . . , the votes [being taken] by states . . .

Pursuant to this constitutional provision, the State of Alabama enacted statutory provisions to regulate the selection process for its presidential electors. The Alabama system is embodied in *Code of Alabama 1975*, §17-19-1 et seq.

*Code of Alabama 1975*, §17-19-3 provides in part:

The names of all candidates for President and Vice-President who are nominated as provided in this chapter shall be printed on the official ballots under the emblem of their respective political parties, as filed in the office of the secretary of state of Alabama. The names of the electors of the candidates for President and Vice-President shall not be printed upon the ballots. A vote for a candidate for President or Vice-President shall be counted as a vote for the electors of the political party or independent body by which such candidates were named, as listed on the certificate of nomination or nominating petition.

*Code of Alabama 1975*, §17-8-3 provides:

There shall be provided at each polling place at each election at which public officers are voted for, but one form of ballot for all the candidates for pub-

lic office, and every ballot shall contain the names of all candidates whose nominations for any office specified on the ballot have been duly made and not withdrawn, as provided in this chapter, together with the title of the office, arranged in tickets under the titles of the respective political parties or independent bodies as certified in the certificates of nomination. When electors for the President and Vice-President of the United States are to be elected, the names of the candidates for President and Vice-President shall be listed on the ballot, but not the names of the electors. (Code 1907, §378; Code 1923, §468; Code 1940, T. 17, §153.)

Petitioners contend that the method used in Alabama of selecting presidential electors is discriminatory as it provides for a "winner-take-all" system. However, such methods for selecting presidential electors have been held to be consistent with constitutional mandates.

In *McPherson v. Blacker*, 146 U.S. 1, 13 S. Ct. 3, 36 L. Ed. 869 (1862), it was contended that a Michigan statute which authorized the election of a presidential and vice-presidential candidates by the electoral system was in conflict with the Constitution. In upholding the constitutionality of the Michigan scheme this Court stated ". . . the appointment and mode of appointment of [presidential] electors belong exclusively to the states under the Constitution of the United States." 146 U.S. at 35.

And in *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622, affirmed 89 S. Ct. 555, 393 U.S. 320, 21 L. Ed. 2d 516, the validity of a Virginia statute providing for election of presidential electors by statewide election was



challenged. Plaintiffs argued that electors should be chosen by districts and not by a winner-take-all method. The lower court upheld the Virginia statute and stated in part:

Thus, it cannot be safely said that the draftsmen of Article II, Section 1 believed that the electors must be chosen by congressional or other districts, as plaintiffs here contend. The clause literally leaves to the State legislature the appointment of electors "in such manner" as it may direct. Bestowal of this discretion is emphasized in *McPherson v. Blacker*, 146 U.S. 1, 13 S. Ct. 3, 36 L. Ed. 869 (1892).

In addition, in the *Williams* case it was contended that there was inequality in the worth of ballots of Virginia citizens and citizens of other states. New York, was used there as an example, as it is here, to show the disparity. However, the court rejected this contention and stated:

Disparities of this sort are to be found throughout the United States wherever there is a State numerical difference in electors. But plainly this unevenness is directly traceable to the Constitution's presidential electoral scheme and to the permissible unit system.

For these reasons the injustice cannot be corrected by suit, especially one in which but a single State is impleaded. Litigation of the common national problem by a joinder of all the States was evidently unacceptable to the Supreme Court. *State of Delaware v. State of New York*, supra, 385 U.S. 895, 87 S. Ct. 198. Readily recognizing these impediments, plaintiffs point to the district selection of electors as a solution, or at least an amelioration, of

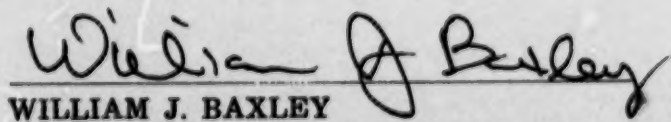
this interstate inequality of voters. However, to repeat, this method cannot be forced upon the State legislatures, for the Constitution gives them the choice, and use of the unit method of tallying is not unlawful. (288 F. Supp. at 628)

The Alabama election statutes, just as the Virginia and Michigan statutes, provide an acceptable and constitutional scheme for selecting presidential electors. The states are given broad power to establish an electoral system limited only by those provisions as to the number of electors and ineligibility of certain persons. *McPherson v. Blacker*, supra. Thus, consistent with the Constitution, Alabama has enacted provisions for the selection of presidential electors and under the foregoing authorities the method used neither discriminates among the voters of the several states nor discriminates against minority voters because the electors are collectively chosen rather than on a district basis.

## CONCLUSION

Respondents submit that as the Alabama statutory scheme for selecting presidential electors is not constitutionally infirm, the petition for writ of certiorari is due to be denied.

Respectfully submitted,

  
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ATTORNEY GENERAL OF ALABAMA

Walter S Turner

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Sarah M Greenhaw

SARAH M. GREENHAW  
ASSISTANT ATTORNEY GENERAL  
OF ALABAMA  
ATTORNEYS FOR RESPONDENTS.

# CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of the foregoing Brief and Argument in Opposition to Petition for a Writ of Certiorari on Honorable Lea Harris, 139 Lee Street, Montgomery, Alabama 36104, and one copy to Honorable Walter W. Barnett, Deputy Chief, Appellate Section, Civil Rights Division, United States Attorney General, Washington, D. C., by placing same in the United States Mail, postage prepaid, on this 19th day of December, 1978.

Walter S Turner

WALTER S. TURNER  
CHIEF ASSISTANT ATTORNEY GENERAL  
OF ALABAMA

Sarah M Greenhaw

SARAH M. GREENHAW  
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## APPENDIX A

**FIFTH CIRCUIT COURT ORDER  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

NO. 78-1667

Summary Calendar\*

JOHN HITSON, et. al.,

Plaintiffs-Appellants.

V.

MADAM AGNES BAGGETT, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the  
Middle District of Alabama

September 6, 1978

Before BROWN, Chief Judge, COLEMAN and VANCE,  
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21. ¶

\*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens  
Casualty Company of New York*, et al., 5 Cir. 1970, 431  
F.2d 409, Part I.

¶See *NLRB v. Amalgamated Clothing Workers of America*,  
5 Cir. 1970, 430 F.2d 966.

## APPENDIX B

**ORDER OF THE DISTRICT COURT  
IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA,  
NORTHERN DIVISION**

JOHN HITSON; SAMUEL MOORE; and WILLIAM MILLS,  
Plaintiffs.

v.

MADAM AGNES BAGGETT, in her official capacity as  
Secretary of State of the State of Alabama; HONORABLE  
GEORGE C. WALLACE, in his official capacity as Governor  
of Alabama; HONORABLE WILLIAM BAXLEY, in his  
official capacity as Attorney General of the State of Ala-  
bama,

Defendants.

**CIVIL ACTION NO. 78-15-N  
ORDER**

In accordance with the memorandum opinion entered in  
this case this date, and pursuant thereto, it is ORDERED  
that plaintiffs' complaint be and is hereby dismissed for  
failure to state a claim upon which relief can be granted.

It is further ORDERED that the costs of this action be  
and are hereby taxed against plaintiffs.

Done, this 8th day of March, 1978.

S/Frank Johnson  
District Judge



**MEMORANDUM OPINION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA,  
NORTHERN DIVISION**

**JOHN HITSON; SAMUEL MOORE; and WILLIAM MILLS,**  
Plaintiffs.

v.

**MADAM AGNES BAGGETT**, in her official capacity as Secretary of State of the State of Alabama; **HONORABLE GEORGE C. WALLACE**, in his official capacity as Governor of Alabama; **HONORABLE WILLIAM BAXLEY**, in his official capacity as Attorney General of the State of Alabama,

Defendants.

CIVIL ACTION NO. 78-15-N

**MEMORANDUM OPINION**

This is a civil rights action brought under 42 U.S.C. 1983. Jurisdiction is founded on 28 U.S.C. 1342. Plaintiffs are John Hitson, a citizen of the United States with Indian ancestry, and Samuel Moore and William Mills, citizens of the United States who are black. Defendants include George C. Wallace, Governor of Alabama; William Baxley, Attorney General of Alabama; and Agnes Baggett, Secretary of State of Alabama. Each is sued in his or her official capacity. In their complaint, plaintiffs charge that Alabama's present "manner and system" of selecting presidential electors violates their constitutional rights.

The case is now submitted on defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

The Constitution provides for the election for the president in the following language:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled to in the Congress . . .

The Electors shall meet in their respective states, and vote by ballot for President . . . and transmit [the tally of their votes] sealed to the seat of the government of the United States, directed to the President of the Senate;— . . . The person having the greatest number of votes . . . shall be president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers . . ., the house of representatives shall choose . . ., the votes [being taken] by states . . . U.S. CONST. art. II, 1 cl. 2, amend. XII.

In Alabama, as in nearly every other state, the Legislature has directed that the state's presidential electors be "appoint[ed] through a statewide popular election. Candidates qualified to run in the state's presidential election submit to appropriate state authorities a list of electors pledged to support their candidacy. The state's presidential contest is really a contest among these slates of electors. A vote for a particular presidential candidate is counted as a vote for the slate of electors pledged to support him. The slate of electors which receives the greatest popular support is in the state's presidential election becomes the slate which casts the state's electoral votes.

In their complaints, plaintiffs raise several objections to this system. First, they contend that the nationwide use of the "manner and system" of selecting presidential electors employed in Alabama results in invidious discrimination among the voters of the several states. Plaintiffs contend that, as a result of the nationwide use of this system, when a citizen of a large state casts his vote for president, it

carries more "weight" than the vote of a citizen of a small state. This is because, according to plaintiff, his vote is "multiplied" by a larger number of presidential electors than is the vote of the citizen of a small state. Thus, according to plaintiffs, a citizen of a state like California, with 45 electoral votes, has his single vote for president "counted" 45 times, whereas a citizen of a state like Alabama, with only 9 electoral votes, has his presidential vote "counted" only 9 times. Thus, according to plaintiff, a citizen of a state the size of California has 500 percent more influence in affecting the outcome of the nation's presidential election than does the citizen of a state the size of Alabama.

The court has serious reservations concerning the logic of plaintiffs' arguments. Nevertheless, even were plaintiffs' contentions logically sound, they would not state a good claim for relief. The discrimination of which plaintiffs complain [if it is discrimination] is a product of the constitutional mandate that our president be elected through an "Electoral College". As such, it is a type of "discrimination" specifically sanctioned by the Constitution. Cf. *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622 (E.D.Va. 1968) (three-judge ct.), *aff'd mem.* 393 U.S. 320 (1969). Thus, while this "discrimination" may be considered by some to be unfair, it is hardly "unconstitutional".

Second, plaintiffs contend that, because of its state-wide and at-large features, Alabama's electoral scheme for the selection of presidential electors discriminates against minority voters. Plaintiffs reason that, if Alabama's presidential electors were selected on a district basis, minority voters, because of their geographic concentration, could control the selection of at least one or more of the state's electors. Under Alabama's present scheme for the election of presidential electors, plaintiffs contend, minority voters do not have a determinative voice as to the selection

of any elector. By not structuring its election for presidential electors on a district basis so as to afford minority voters the opportunity to elect at least one presidential elector, plaintiffs argue, Alabama has violated plaintiffs' constitutional rights.

There is no basis for plaintiffs' argument that plaintiffs' rights as minority citizens have been violated because Alabama has failed to structure its election for presidential electors on a district basis. It may be true, as plaintiffs argue, that if Alabama conducted its election for presidential electors on a district basis, minority voters would have the electoral power to control the selection of at least one presidential elector. However, that Alabama has not chosen to so structure its electoral scheme does not violate plaintiffs' rights. No minority group has a right under the Constitution to insist that state electoral systems be designed, where possible, to give its members electoral control over the selection of persons for particular political office. See *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Fortson v. Dorsey*, 379 U.S. 433 (1967); *David v. Garrison*, 553 F.2d 923 (5th Cir. 1977). Moreover, a state is free, under the Constitution, to conduct elections on a state-wide or at-large basis so long as the electoral system it establishes does not "operate to minimize or cancel out the voting strength of (minority voters)." *Fortson v. Dorsey*, *Supra*, at 439; *Whitcomb v. Chavis*, *supra*; *David v. Garrison*, *Supra*. Here, there is no contention that Alabama's electoral scheme for the selection of presidential electors operates in such a manner. Accordingly, plaintiffs' claim that the statewide and at-large features of Alabama's election for presidential electors violates the rights of minority voters fails to state a good basis for relief.

Finally, plaintiffs contend that the Constitution prohibits Alabama from selecting presidential electors by popular election. This contention is two-pronged. First, plaintiffs



argue that, because the Constitution provides that presidential electors be "appoint[ed]" by the several states, it is unlawful for Alabama to provide for their selection by popular ballot. Second, plaintiffs contend that the Constitution's guaranty of a republican form of government to the several states is a prohibition on the use of "direct democracy" for the selection of presidential electors. See U.S. CONST. art. IV, 4. Both of these contentions are without merit. "[T]he word 'appoint' is not the most appropriate word to describe the result of a popular election . . . [B]ut it is sufficiently comprehensive to cover that mode, and was manifestly used [in Article II, Section 1 of the Constitution] as conveying the broadest power of determination." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). Thus, consistent with the Constitution, a state may provide for the selection of presidential electors "through popular election . . . or as otherwise might be directed." *Id.*, at 28 (emphasis added). The guaranty clause is not to the contrary. "[T]he distinguishing feature of (the) form (of government guaranteed in Article IV, Section 4) is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies." *In re Duncan*, 139 U.S. 449 (1891). By no stretch of the imagination does Alabama's "manner and system" of selecting its presidential electors violate these tenets of government.

Therefore, the Court finds, defendants' motion to dismiss should be granted.

An order will be entered accordingly.

Done, this the 8th day of March, 1978.

S/Frank Johnson  
District Judge

## APPENDIX C

Article II, Section 1, Clause 2, Constitution of the United States:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress."

Article IV, Section 4, Constitution of the United States:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence."

Amendment XII to the Constitution of the United States:

"The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate;—The president of the senate shall, in presence of the senate and house of representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for president, shall be the president, if such number be a majority



of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representative shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

## APPENDIX D

### Code of Alabama 1975 Section 17-19-3

"The names of all candidates for President and Vice President who are nominated as provided in this chapter shall be printed on the official ballots under the emblem of their respective political parties as filed in the office of the Secretary of State of Alabama. The names of the electors of the candidates for President and Vice President shall not be printed upon the ballots. A vote for all candidates for President and Vice President shall be counted as vote for the electors of the political party or independent body by which such candidates were named, as listed on the Certificate of Nomination or nominating petition. (Acts 1975, Third Ex. Sess. No. 138, Sec. 3)."

### Code of Alabama Section 17-8-3

"There shall be provided at each polling place at each election at which public officers are voted for, but one former ballot for all the candidates for public office, and every ballot shall contain the names of all candidates whose nominations for any office specified on the ballot have been duly made and not withdrawn, as provided in this chapter, together with the title of the office, arranged in tickets under the titles of the respective political parties or independent bodies as certified in the Certificates of Nomination. When electors for the President and Vice President of the United States are to be elected, the names of the candidates for President and Vice President shall be listed on the ballot, but not the names of the electors."